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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. VINCENT THOMAS REYES, Defendant and Appellant.	F055012 (Super. Ct. No. F07906310) **OPINION**

APPEAL from a judgment of the Superior Court of Fresno County. W. Kent Levis, Judge.

Benjamin Owens, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Michael P. Farrell, Assistant Attorney General, Julie A. Hokans and Clara M. Levers, Deputy Attorneys General, for Plaintiff and Respondent.

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Following a jury trial, Vincent Thomas Reyes (appellant) was convicted of assault with a deadly weapon (Pen. Code, § 245, subd. (a)(1),[1] and the jury found true the allegation that appellant personally inflicted great bodily injury (§ 12022.7, subd. (a)). In a bifurcated proceeding, the appellant admitted that he had served three prior prison terms pursuant to section 667.5, subdivision (b). The trial court sentenced appellant to a total prison term of nine years: the upper term of four years on the assault, three years on the great bodily injury enhancement, and 2 one-year terms on the prison priors.

On appeal, appellant contends that the prosecutor committed misconduct and that defense counsel was ineffective at sentencing. Respondent contends the trial court erred when it stayed rather than imposed a one-year enhancement. We find no error and affirm.

FACTS

In July of 2007, Erica Vasquez met appellant and the two began dating. Earlier in 2007, Vasquez had dated Carlos Rivas but, after Rivas assaulted her, she obtained a restraining order against him.

Rivas, however, continued to call Vasquez. On August 11, 2007, Rivas called Vasquez approximately 20 times and, during one conversation, he told her that if he saw her in a specific bar he would "take [her] away" from appellant.

That evening appellant and Vasquez went to that bar. When Rivas arrived, Vasquez told appellant that Rivas was there and pointed him out. As Rivas walked toward the dance floor, appellant, by his own admission, stabbed Rivas twice in the stomach with a buck knife. Rivas claimed he was not armed at the time, but appellant testified that he saw something shiny in Rivas's hand. Despite the claims of Vasquez and appellant to the contrary, Rivas denied giving anyone "dirty looks" or making threatening gestures before he was stabbed. Appellant and Vasquez testified that Rivas slammed his beer bottle on the table in a threatening manner.

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[1]All further statutory references are to the Penal Code unless otherwise stated.

After appellant stabbed Rivas, he and Vasquez left the bar. Appellant discarded the knife in an open field, but it was later retrieved by a police officer.

The stab wound to Rivas punctured his intestine and colon. He was hospitalized for a month and underwent four surgeries.

DISCUSSION

1. Did the prosecutor commit misconduct?

Appellant contends four instances of prosecutorial misconduct violated his right to due process and his right to confront witnesses. He asserts the prosecutor engaged in prejudicial misconduct in his closing and rebuttal arguments that requires reversal of the conviction because "[i]t cannot be said with reasonable certainty that these tactics did not influence the jury's verdict." We disagree.

> "'The applicable federal and state standards regarding prosecutorial misconduct are well established. "'A prosecutor's … intemperate behavior violates the federal Constitution when it comprises a pattern of conduct so "egregious that it infects the trial with such unfairness as to make the conviction a denial of due process."'" [Citations.] Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves "'"the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury."'" [Citation.]" (*People v. Navarette* (2003) 30 Cal.4th 458, 506.)

Prosecutorial misconduct requires reversal only if it prejudices the defendant. (*People v. Fields* (1983) 35 Cal.3d 329, 363.) Where it infringes upon the defendant's constitutional rights, reversal is required unless the reviewing court determines beyond a reasonable doubt that the misconduct did not affect the jury's verdict. (*People v. Harris* (1989) 47 Cal.3d 1047, 1083.) Prosecutorial misconduct that violates only state law is cause for reversal when it is reasonably probable that a result more favorable to the defendant would have occurred had the prosecutor refrained from the objectionable conduct. (*People v. Barnett* (1998) 17 Cal.4th 1044, 1133.)

The issue of prosecutorial misconduct is forfeited on appeal if not preserved by timely objection and request for an admonition in the trial court. (*People v. Cunningham* (2001) 25 Cal.4th 926, 1000.) If an objection has not been made, '"'the point is

reviewable only if an admonition would not have cured the harm caused by the misconduct"'" (*id.* at pp. 1000-1001) or if an objection would have been futile. (*People v. Hill* (1998) 17 Cal.4th 800, 820-821.)

Here, defense counsel never objected on the grounds of prosecutorial misconduct and did not request that the jury be admonished, thereby forfeiting the claim on appeal. (*People v. Cunningham*, *supra*, 25 Cal.4th at p. 1000.) Appellant argues his claim of prosecutorial misconduct is not forfeited because any objection would have been futile. We disagree, as nothing in the record suggests that a meritorious objection would not have been sustained and followed by an admonition to the jury. (See, e.g., *People v. Green* (1980) 27 Cal.3d 1, 34, overruled on other grounds in *People v. Hall* (1986) 41 Cal.3d 826, 834, fn. 3 ["[T]he initial question to be decided in all cases in which a defendant complains of prosecutorial misconduct for the first time on appeal is whether a timely objection and admonition would have cured the harm. If it would, the contention must be rejected"].) But even on the merits, we find appellant's claim lacking.

Appellant points to the following instances in which he claims prosecutorial misconduct occurred:

First, appellant argues that the prosecutor misrepresented the truth during closing argument. At trial, outside the presence of the jury, the prosecutor acknowledged to the trial court that Rivas was on felony probation, but the parties agreed that the underlying felony, a violation of Health and Safety Code section 11377, could not be used to impeach Rivas. Thereafter, in closing argument, the prosecutor discussed the credibility of the various witnesses, arguing that Vasquez (who married appellant two weeks before trial) was biased. He then stated:

> "We've had one witness that testified in this trial that was convicted of a felony. That was [appellant]. He was convicted not of one felony, but of two felonies. And you can consider that in disbelieving his testimony. The only convicted felon to testify in this trial."

A state's knowing use of false evidence, including evidence that goes to witness credibility, violates due process. (*Napue v. Illinois* (1959) 360 U.S. 264, 269-270.)

Respondent acknowledges that the prosecutor "was mistaken," but argues, and we agree, that no prejudice accrued therefrom. There was ample evidence that Rivas's credibility was questionable. The jury heard that Rivas had a misdemeanor conviction for domestic violence against Vasquez, an earlier misdemeanor conviction for domestic violence in 2003, and a charge of domestic violence pending involving a different victim. There was also evidence that, on the night of the stabbing, Rivas was in violation of a restraining order, and that he had committed other unreported physical assaults on Vasquez. In describing Rivas, the prosecutor said he was "certainly [] not a Boy Scout," and defense counsel also noted that Rivas "had been convicted before."

In addition, the jury was instructed on three occasions that statements of counsel were not evidence (Judicial Council of Cal. Crim. Jury Instns. (2007) CALCRIM No. 222), and that it was the duty of the jury to determine the facts based on all evidence. (CALCRIM No. 223). The presumption is that the jury followed the instructions and that "'the jury treated the court's instructions as statements of law, and the prosecutor's comments as words spoken by an advocate in an attempt to persuade.' [Citation.]" (*People v. Morales* (2001) 25 Cal.4th 34, 47.)

Next, appellant argues that, on two occasions, the prosecutor improperly vouched for a witness. The first instance involved the witness Rosie Garcia, who testified at trial that she saw the stabbing and that she did not see a knife in Rivas's hands, contradicting appellant's testimony. Garcia testified that, just prior to the stabbing, Rivas approached her aunt with his hands outstretched and asked her to dance.

During closing, the prosecutor several times referred to Garcia's lack of bias and credibility, stating she was "the only civilian witness in this case who is not an interested party in one way or the other. She's not friends with [appellant]. She's not friends with the victim." The prosecutor also referred to Garcia as "a completely disinterested witness" and "the believable witness." And during rebuttal he stated, "I want to stress this one more time—Rosie Garcia who is not connected to anybody. She saw what

happened. She has no bias. She has no ax to grind with anybody. And she told you what she saw."

A prosecutor is entitled to comment on the credibility of a witness based on evidence adduced at trial. (*People v. Thomas* (1992) 2 Cal.4th 489, 529.) Prosecutorial assurances regarding the honesty or reliability of a prosecution witness, supported in the record, do not constitute improper "vouching." (*People v. Medina* (1995) 11 Cal.4th 694, 757.) What a prosecutor may not do is to suggest that he or she has information undisclosed to the jury bearing on the issue of credibility, veracity, or guilt. The danger in such remarks is that the jurors will believe that some inculpatory evidence, known only to the prosecution, has been withheld from them. (*People v. Padilla* (1995) 11 Cal.4th 891, 945-946, overruled on another ground in *People v. Hill, supra*, 17 Cal.4th at p. 823, fn. 1; *People v. Green*, *supra*, 27 Cal.3d at p. 35.)

Here, the prosecutor's comments merely reiterated what the jury already knew: that Garcia, outside of witnessing the stabbing, had no connection to either appellant or Rivas. In doing so, the prosecutor did not improperly vouch for the witness.

In the other instance of alleged vouching, appellant argues that the prosecutor, during rebuttal, improperly vouched for a witness when he told the jury:

> "And at that preliminary hearing, if [Rivas's] testimony had been any different than it was on the witness stand, [defense counsel] would have pointed that out to everybody. Carlos Rivas has only told one story. He's not changed his story like [Vasquez], like [appellant]."

In order to address appellant's concern, we need to place the prosecutor's comments in the context of what occurred earlier during defense counsel's cross-examination of Rivas:

> "Q … Do you recall speaking with a police officer immediately after the events that night?
>
> "A No, sir. I don't remember that.
>
> "Q Do you ever remember speaking with a police officer to tell him what had happened?

"A I was in the ambulance.

"Q So was that a yes or a no?

"A No.

"Q Never talked to a police officer that you remember?

"A Not that I remember. I was in shock.

"Q Okay. And you weren't in shock when you testified on the 10th of September [the date of the preliminary hearing]; right?

"A No, sir. I was in court here with you.

"Q Okay. So the question that I'm asking you, sir, is did you talk to a police officer, ever, between August 11, 2007, and today's date?

"A About this case?

"Q Yes.

"A No. I was in the hospital, sir."

In closing argument, defense counsel said:

"Now, in this case, there's something very interesting going on because [Rivas] testified he never gave a statement to the police about what happened. Never. Why? I submit to you he wanted to keep his mouth shut about his culpability, about the aggressive conduct that he had been engaged in. [¶] … [¶] I did find it interesting that Detective Barnes stated that after they had the suspect in custody, they didn't do any follow-up investigation. They didn't assign a chief investigating officer because it seemed open and shut. Well, the problem with ['Jit seemed open and shut[']] is that they never got [Rivas's] side of it. They never asked [Rivas] after this happened, ['Jwell, did you have a weapon,['] anything like that. No."

In rebuttal, the prosecutor then stated:

"[T]he defense is making a point about [Rivas] not remembering giving a statement to police officers, saying that he did not have an opportunity to lie …. And I believe the timetable is going to be [Rivas] was stabbed, injured, into the hospital and very shortly after the hospital testified at a preliminary hearing. [¶] And at that preliminary hearing, if his testimony had been any different than it was on the witness stand, [defense counsel]

> would have pointed that out to everybody. Carlos Rivas has only told one story. He's not changed his story, like [Vasquez], like [appellant]."

Although the jury heard evidence that Rivas had testified about the stabbing before trial, there was no evidence about the substance of his prior testimony. For this reason, the prosecutor was not entitled to suggest that Rivas's trial testimony was consistent with his preliminary hearing testimony. (See *People v. Hall* (2000) 82 Cal.App.4th 813, 817 [reversible error for prosecutor to tell jury that testimony of officer not called as a witness would have been the same as officer who testified] and *People v. Gaines* (1997) 54 Cal.App.4th 821, 825 [misconduct for prosecutor to argue that defense secured alibi witness's absence, that prosecution tried to find witness, and that witness, if called, would have impeached defendant].) While conceding that these statements by the prosecutor were misconduct, respondent argues, and we agree, no prejudice accrued to appellant.

Because the jury heard Rivas testify and was aware of his suspect credibility, the statement by the prosecutor was not likely to sway the jury. If the prejudice from an assertion of fact outside the evidence is mild, it can be mitigated and rendered harmless by instructions requiring jurors to decide the case based only on evidence received at trial and directing them not to consider statements of counsel to be evidence. (*People v. Hughey* (1987) 194 Cal.App.3d 1383, 1396.) Here, the trial court's comments clearly told the jury it had to rely on its own recollection of the evidence in determining facts, the jury was instructed that statements of counsel were not evidence (CALCRIM No. 222), and that it was the duty of the jury to determine the facts based on all evidence (CALCRIM No. 223).

In addition, the evidence against appellant at trial was strong. Appellant testified that he stabbed Rivas twice. The only issue for the jury was whether appellant acted in self-defense. Appellant testified that Rivas was making threatening gestures and was holding something shiny. Rivas testified that he did not have a weapon when appellant stabbed him and that he made no threatening gestures. Garcia testified that she saw

appellant holding a knife, saw him stab Rivas, and never saw Rivas with a weapon. After the stabbing, appellant fled and threw the knife from the car.

On such a record, even assuming the prosecutor's statement was misconduct, it was not prejudicial pursuant to either *Chapman v. California* (1967) 386 U.S. 18, 24, or the lesser standard of *People v. Watson* (1956) 46 Cal.2d 818, 836.

Finally, appellant argues that the prosecutor committed misconduct when he was allowed to be his own witness, exacerbated by the fact that appellant then had no right to cross-examine him.

At trial, appellant argued that he acted in self-defense when he stabbed Rivas. During rebuttal, the prosecutor argued:

> "The defense is making a big deal about a knife being found at the bar. I will submit to you that at a crowded night at the [bar] when the police shut the bar down to investigate, I'm surprised they didn't find three guns, two knives and nun-chucks. I am surprised they only found one knife."

A prosecutor commits misconduct by referring in closing argument to facts that are not in evidence. As the court explained in *People v. Hill, supra,* 17 Cal.4th at page 828:

> "[S]uch practice is 'clearly … misconduct' [citation], because such statements 'tend[] to make the prosecutor his [or her] own witness—offering unsworn testimony not subject to cross-examination. It has been recognized that such testimony, "although worthless as a matter of law, can be 'dynamite' to the jury because of the special regard the jury has for the prosecutor, thereby effectively circumventing the rules of evidence." [Citations.]' [Citations.] 'Statements of supposed facts not in evidence … are a highly prejudicial form of misconduct, and a frequent basis for reversal.'"

Here, the statement by the prosecutor—suggesting the likelihood of the presence of weapons at the bar on a crowded night—was of minimal importance and no more than a reasonable inference that could be drawn from the evidence already before the jury.

In conclusion, appellant argues that the cumulative impact of the prosecutor's misconduct deprived him of a fair trial. We disagree. We have either rejected appellant's claims of error or found any errors, assumed or not, to be not prejudicial on an

individual basis. Viewing the errors as a whole, we conclude they do not warrant reversal of the judgment. (*People v. Stitely* (2005) 35 Cal.4th 514, 560.)

2. Was counsel ineffective at sentencing?

Appellant next contends the trial court erred by using his prior convictions both as an aggravating factor in sentencing him to the upper term on the assault count and to support a one-year enhancement for each of his two prison priors pursuant to section 667.5, subdivision (b). He further contends that he received ineffective assistance of counsel when his trial attorney failed to object to the dual use of his prior convictions. We disagree.

At sentencing, the probation report stated that appellant's criminal history consisted of a juvenile adjudication for shooting at an inhabited dwelling (§ 246) in 1993; three counts of corporal injury to a spouse (§ 273.5, subd. (a)), two in 1998 and one in 2001; two counts of escape from a work camp (§ 4532, subd. (b)(1)), both in 1999; and possession of methamphetamine (Health & Saf. Code, § 11377, subd. (a)) in 2006. Appellant had three violations of parole, in 2005, 2006, and 2007. The report listed as factors in aggravation relating to the crime that the crime involved great violence and great bodily harm, which disclosed a high degree of cruelty, viciousness or callousness. Factors in aggravation relating to appellant were that he engaged in violent conduct, indicating he was a serious danger to society; his prior convictions as an adult or sustained petitions in juvenile dependency were numerous or of increasing seriousness; he was on probation or parole when the crime was committed; and his prior performance on probation or parole was unsatisfactory. The report listed no factors in mitigation and recommended a sentence of 10 years, consisting of the aggravated term of four years, plus a three-year sentence for the great bodily injury enhancement, and 3 one-year terms for appellant's three prison priors.

The trial court stated that it wished to avoid "dual use" and would not consider the listed aggravating factor of the crime itself, that the crime involved great violence and great bodily harm, because the crime "itself is a crime of great violence, and he's being

sentenced accordingly because of great violence." Nor would it consider the factor in aggravation that the conduct appellant engaged in was violent, again because he was being sentenced on that charge. Instead, the court stated that it found in aggravation that appellant's prior convictions were numerous and increasing in seriousness, that he was on probation at the time the current crime was committed, and that his prior performance on probation had not been satisfactory. The trial court then imposed sentence: the upper term of four years on the assault, three years on the great bodily injury enhancement, and 3 one-year terms for each prior offense. It then struck the sentence of one prior enhancement term, the conviction for escape from work camp, because "he was still technically in the custody of the California Department of Corrections" at the time.

To prevail on an ineffective assistance of counsel claim, a defendant must show that counsel's performance failed to meet an objective standard of reasonableness and that the defendant was prejudiced by such failure. (See *Strickland v. Washington* (1984) 466 U.S. 668, 690-694; *People v. Ledesma* (2006) 39 Cal.4th 641, 745-746.) As appellant notes, a prior conviction cannot be used to both enhance a sentence under section 667.5, subdivision (b) or 12202.7 and to aggravate a sentence above the midterm. (Cal. Rules of Court, rule 4.420(c) & (d); § 1170, subd. (b); *People v. McFearson* (2008) 168 Cal.App.4th 388, 395.) Circumstances in aggravation, however, may be supported by a variety of grounds, including several factors relating to the nature of the crime or the defendant. (Cal. Rules of Court, rule 4.421.) Factors the trial court may consider include, among others, whether a defendant's "prior convictions … are numerous or of increasing seriousness," whether the defendant "was on probation or parole when the crime was committed," and whether the defendant's "prior performance on probation or parole was unsatisfactory." (*Id.*, rule 4.421(b)(2), (4), (5).)

Here, it is evident from the record that the trial court did not base its decision to impose the upper term strictly on the two prior convictions that supported the enhancement for the prison priors. Appellant's criminal record consisted of more than the two convictions that served to enhance his sentence. The trial court specifically

stated that it selected the upper term because it found that appellant's prior convictions were "numerous, and … they are increasing in seriousness," and he was "on probation at the time that this [crime] was committed, and his prior performance on probation has not been satisfactory."

Even if the trial court improperly used the two convictions in violation of the dual-use prohibition, it is evident it would have imposed the upper term based on the additional factors articulated. Thus, counsel was not ineffective for failing to object to the imposition of the upper term. (*People v. Price* (1991) 1 Cal.4th 324, 387 ["[c]ounsel does not render ineffective assistance by failing to make motions or objections that counsel reasonably determines would be futile"].)

3. Did the trial court err in staying imposition of a one-year enhancement?

Respondent contends that the trial court erred when it mistakenly stayed the one-year enhancement for appellant's 1999 prior prison term for escape from a work camp (§ 4532, subd. (b)(1)). Respondent argues that the enhancement was mandatory and that the stayed enhancement was an unauthorized sentence which must be imposed. Respondent is correct that, once the prior prison term is found true, the trial court may not stay the one-year enhancement, which is mandatory unless stricken. (*People v. Langston* (2004) 33 Cal.4th 1237, 1241; see also *People v. McCray* (2006) 144 Cal.App.4th 258, 267-268 [trial court must either impose or strike prior prison term enhancement; court cannot impose enhancement and then stay its execution].) But we disagree with respondent that it was improperly stayed here.

Appellant admitted his prior convictions, including his conviction for escape from a work camp. At sentencing, defense counsel requested that the court find this particular prior not true, arguing that, to support an enhancement under section 667.5, subdivision (b), the individual must be freed from prison custody between service of the prison terms and that an escapee is still, technically, within the custody of the Department of Corrections. In the alternative, counsel asked that the court stay or strike the

enhancement. The court found the conviction qualified under section 667.5, subdivision (b), but stated that it would "stay that particular one year prior."

But, as appellant points out, the enhancement pursuant to section 667.5, subdivision (b) was, in fact, subsequently stricken by the trial court. Although the trial court originally stated that it would "stay" the enhancement, it later corrected itself by striking the enhancement:

> "And Counsel has pointed out his belief that under 667.5(b), that the term cannot be stayed. I will strike the one enhancement under section 667.5(b) … in view of the fact that [appellant] was technically in custody at the time that it occurred."

The minute order and abstract of judgment also reflect that the enhancement was stricken.

Because the prison prior enhancement was stricken and not stayed, respondent's argument is without merit.

DISPOSITION

The judgment is affirmed.

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DAWSON, J.

WE CONCUR:

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WISEMAN, Acting P.J.

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KANE, J.